BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA K. WILLIAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,860
GENERAL ELECTRIC	)	
Respondent	)	
AND	)	
	)	
ELECTRIC MUTUAL LIABILITY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark dated April 3, 1997. The Appeals Board heard oral argument September 3, 1997.

APPEARANCES

Claimant appeared by her attorney, Steven L. Foulston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Dana D. Arth of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

ISSUES

Claimant has alleged, and the ALJ found, claimant suffered injury caused by work during the period April 21, 1994, through February 14, 1995. The ALJ found February 14, 1995, the last date claimant worked for respondent, to be the date of accident. On appeal respondent contends claimant sustained the injuries much earlier, as early as 1990, and asserts claimant: (1) failed to give timely notice; and (2) failed to make timely written claim. Both issues depend on the date of accident.

Respondent also contends it is entitled to a credit for overpayment of temporary total disability benefits. According to respondent, the treating physician, Dr. Tyrone D. Artz,

declared claimant had reached maximum medical improvement and released claimant with restrictions on September 28, 1995. Respondent erroneously paid temporary total disability for an additional 11.86 weeks.

Respondent also disputes the ALJ's decision to award a 68 percent work disability. Respondent contends claimant is entitled, at most, to a scheduled injury. If the Board finds a general body injury, respondent contends the benefits should be limited to functional impairment or at least a lesser work disability.

Finally, respondent contends the ALJ should not have awarded unauthorized medical expenses because none were incurred.

Respondent's application for review suggests respondent also contests the finding that claimant's injuries arose out of and in the course of her employment. Respondent did not, however, argue that issue either in its brief or at oral argument. The Board adopts the ALJ's finding that claimant suffered accidental injury arising out of and in the course of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As more fully explained in the findings of fact and conclusions of law below, the Board finds and concludes as follows: (1) February 14, 1995, should be considered the date of claimant's accident; (2) claimant gave timely notice; (3) claimant made timely written claim; (4) respondent is entitled to a credit for overpayment of 11.86 weeks of temporary total disability; (5) claimant is not entitled to unauthorized medial expense; and (6) claimant is entitled to a work disability based, in part, on a 36 percent task loss. But the current record does not permit a reasonable determination of the wage loss component of the work disability equation. For the reasons explained below, the Board concludes the case should be remanded for further evidence on the single issue of wage loss.

Findings of Fact

(1) Claimant began working for respondent, an aircraft engine maintenance center, in 1982 and after a brief period at an entry level position was transferred to the stock room where she worked for the next 13 years.

(2) Claimant had problems on the right side of her neck, low back, and right shoulder and right arm dating back at least to 1990. Claimant was off work for a period and made claim for short term disability benefits. In 1992, Dr. Paul V. Babikian advised claimant she was likely to continue to have problems if she continued with the same work.

(3) Claimant continued to work for respondent in the stock room and in April 1994, after returning to work following gallbladder surgery, claimant had problems with her right shoulder. The problem worsened until she sought treatment from Dr. Artz for right shoulder and right upper extremity complaints in February 1995. Dr. Artz took claimant off work on February 15, 1995, and claimant has not worked since that date.

(4) During the period from April 1994 to February 15, 1995, claimant's duties included repetitive lifting and reaching with her right arm to get parts.

(5) Claimant notified her supervisors of the problems she was having from her work before she left employment in February of 1995.

(6) Dr. Artz diagnosed a bursitis/tendinitis type problem between the scapula and the ribs. He also found evidence of mild carpal tunnel syndrome and ulnar nerve compression on the right. After a period of conservative treatment, he proceeded with release of her right carpal tunnel and her ulnar nerve. He performed the surgery on July 7, 1995. Dr. Artz ultimately rated claimant's impairment as 17 percent of the whole body for right carpal tunnel syndrome, right ulnar nerve compression, and problems in the right shoulder and chest areas. He recommended she limit her work to the sedentary category of work and limit lifting to 10 pounds one-third of the day.

Dr. Artz concluded claimant's injuries were caused or permanently aggravated by the work she did during the period from April 1994 through February 14, 1995. Dr. Artz released claimant to return to work on September 28, 1995.

(7) On November 28, 1995, J. Mark Melhorn, M.D., examined and evaluated claimant's injuries at the request of respondent's insurance carrier. He rated her impairment as 21.4 percent of the right upper extremity, including the shoulder. He found no permanent impairment except for the right upper extremity. He recommended she limit her work to the light category of work with a maximum of 20 pounds, 10 pounds frequent, with task rotation. He said she should limit repetitive tasks to 2 to 4 hours per 8 hours and not use power or vibratory tools. He also recommended no hand-over-shoulder activities on the right.

(8) On April 24, 1996, Dr. Robert A. Rawcliffe, Jr., performed an independent medical examination at the request of the ALJ. It was his opinion that claimant has a functional impairment of 19 percent of the right upper extremity. He concluded the carpal tunnel syndrome and ulnar nerve compression were caused by work from April 1994 through February 14, 1995. He stated that the problems in the chest and rib area did not follow any known anatomic pattern and he, therefore, gave no rating for those problems.

(9) On July 23, 1996, Phillip R. Mills, M.D., examined claimant at the request of claimant's counsel. He rated the impairment as 19 percent of the right upper extremity which he converted to 11 percent of the whole body and 1 percent of the whole body for chest wall discomfort for a total of 12 percent impairment to the whole body. He recommended she not do resistant gripping or crimping, avoid repetitious or prolonged wrist flexion/extension, not use vibratory tools, not do work involving direct wrist pressure, and not work in environments less than 50 degrees without adequate clothing. He also recommended she avoid repetitious or prolonged reaching or working above shoulder level. Finally, Dr. Mills opined that claimant's work duties from April 1994 to February 15, 1995, caused the physical problems he found on examination. Dr. Mills also testified claimant has lost the ability to perform 36 percent of the tasks she performed in the jobs she held during the 15 years prior to the accident in this case.

(10) Respondent has advised claimant it has no job for claimant within her restrictions.

(11) Respondent paid 44 weeks of temporary total benefits for the period February 15, 1995, through December 19, 1995, at the rate of $319 per week.

(12) Claimant made a written claim for benefits on March 24, 1995.

(13) Claimant has not offered into evidence proof of any unauthorized medical expense. Claimant's counsel did refer claimant to Dr. Mills for evaluation.

(14) During the one year between claimant's release to return to work in September 1995 and the regular hearing in October 1996, claimant had not, except for her request to return to work for respondent, applied for work with any other employer.

(15) The parties stipulated that claimant's average weekly wage was high enough to entitle her to the maximum weekly benefit but the record contains no evidence of the exact amount of the pre-injury average weekly wage.

Conclusions of Law

(1) The date of accident for claimant's injuries is February 14, 1995, the last date claimant worked for respondent. Claimant's right side injuries worsened through the last day worked and the injuries were the reason she left on that date. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

(2) Claimant gave timely notice as required by K.S.A. 44-520.

(3) Claimant made timely written claim for compensation as required by K.S.A. 44-520a.

(4) Respondent has overpaid temporary total disability benefits by 11.86 weeks at $319 per week and is entitled to credit for those payments against the permanent partial disability benefits awarded. K.S.A. 1996 Supp. 44-525(c).

(5) Based on the opinions of Drs. Artz and Mills, the Board concludes claimant's disability is an unscheduled or general disability.

(6) K.S.A. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the

> extent of permanent partial general disability shall not be less than the percentage of functional impairment.

(7) K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

(8) The Kansas Court of Appeals has held that the actual wage loss will not be used unless it is first shown that the claimant has made a good faith effort to obtain employment after his/her injury. A claimant who is not earning a wage and might otherwise be considered to have a 100 percent wage loss will not be considered to have a 100 percent wage loss if the claimant has not made a good faith effort to find employment. Absent that showing, a wage will be imputed based on relevant factors, including vocational expert opinion. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(9) The Board finds claimant has not made a good faith effort to find employment and a wage should be imputed to claimant on the basis of the rationale given in the Copeland decision.

(10) This case was tried before the Court of Appeals rendered the Copeland decision. This case was decided by the ALJ in April of 1997 and the Court of Appeals filed its opinion in Copeland on August 29, 1997.

(11) The statutory definition of work disability applicable to this case states that the wage prong factor will be the percentage difference between what the claimant was earning at the time of the injury and the wage the claimant is earning after the injury. K.S.A. 44-510e. The evidence introduced does show an actual difference of 100 percent. The parties to this case did not anticipate that it might be necessary to introduce evidence to allow a calculation of the difference between what the claimant was earning and what the claimant is able to earn as directed by the Copeland decision. The parties stipulated that claimant's pre-injury wage was sufficient for the maximum weekly benefit but did not stipulate to or introduce evidence of the actual pre-injury wage. The parties also introduced no evidence of what claimant would be able to earn after the accident.

(12) The Copeland decision introduced a new element in the work disability calculation which the parties understandably did not anticipate and for that reason did not address through the evidence. Considering the alternatives, the Board concludes that it is most reasonable under these circumstances to remand the case for additional evidence on this single issue rather than to resolve the issue by reference to the burden of proof. The Board, therefore, finds the case should be remanded to allow the parties the opportunity to present evidence as to claimant's pre-injury wage and claimant's post-injury wage earning ability.

(13) Claimant has lost the ability to perform 36 percent of the tasks claimant performed in the jobs she held during the previous 15 years. The Board so finds based on the task loss opinion given by Dr. Mills. Dr. Artz gave a different opinion but then indicated he was not qualified to give the opinion.

(14) On remand, the wage loss found should then be averaged together with the 36 percent task loss to arrive at the work disability. K.S.A. 44-510e.

(15) The only unauthorized medical examination was for the purpose of obtaining a functional impairment rating and claimant is not entitled to be reimbursed for that expense. K.S.A. 44-510(c)(2). Unauthorized medical expense remains a possibility in the future.

(16) Future medical expenses are awarded upon application to and approval by the Director.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge John D. Clark, dated April 3, 1997, should be, and is hereby, remanded to give the parties the opportunity to introduce evidence as to pre- and post-injury wage, including post-injury wage earning ability, and for decision by the Administrative Law Judge as to the wage loss and resulting percentage of work disability.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Dana D. Arth, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director